In the Matter of Thomas L. Huckaby v. New York State Division of Tax Appeals

No. 8
New York Court of Appeals

March 29, 2005, Decided

Peter L. Faber, for appellant.

Julie S. Mereson, for respondents.

READ, J.:

This appeal revisits New York's "convenience of the employer" test, which provides that when a nonresident is employed by a New York employer, income derived from work in another state is taxable by New York unless performed out of state for the necessity of the employer. Here, the taxpayer, a Tennessee resident who works for a New York employer, contends that the convenience test violates the statute that it implements as well as the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. We disagree, and uphold the challenged tax as applied to this taxpayer.

I.

Until 1991, petitioner Thomas L. Huckaby, a Tennessee resident, worked as a computer programmer for Multi-User Computer Solutions (MCS), a Tennessee employer engaged in the business of developing and selling computer software. In 1991, MCS underwent a reorganization, and petitioner's

employment was terminated as a result. He was subsequently hired by the National Organization of Industrial Trade Unions (NOITU), an organization based in Jamaica, New York. NOITU had been an MCS client, and Huckaby had worked on NOITU matters while he was employed by MCS.

NOITU is an umbrella organization of industrial trade unions, which provides administrative services for its members. Petitioner's duties included supporting the software programs that MCS had developed for NOITU; assisting the computer department's manager in selecting new information technology; and, in general, meeting NOITU's programming needs.

NOITU and petitioner agreed that he would work primarily from his home in Tennessee, and would travel to the New York office only as needed to "gather guidelines for revision of existing or creation of new computer programs, and to instruct NOITU's New York personnel in their use." NOITU set up a longdistance data line to connect its Jamaica office to petitioner's Tennessee home office, where he also maintained a dedicated voice telephone line for business purposes and two computer terminals, which were eventually replaced with a personal computer and a printer. NOITU reimbursed petitioner monthly for office expenses, including telephone bills and supplies.

Petitioner concedes that he performed the bulk of his work for NOITU in Tennessee rather than in New York solely for personal reasons; NOITU did not require him to perform any work in Tennessee and would not have objected if he had worked out of its New York office. In 1994, petitioner split his time between NOITU's New York office, where he worked 56 days, and his Tennessee home office, where he worked 187 days. In 1995, he worked in NOITU's New York office for 62 days and in his Tennessee home office for 180 days. Thus, over this two-year period, petitioner spent

roughly 25% of his workdays in New York and 75% of his workdays in Tennessee. He did not work in 1994 or 1995 for any person or any entity other than NOITU as either an employee or an independent contractor.

Petitioner timely filed 1994 and 1995 nonresident income tax returns with New York. He allocated his income between New York and Tennessee based on the number of days he worked in each state relative to the total number of days he worked in each tax year.

Upon subsequently auditing petitioner's 1994 and 1995 returns, the New York State Department of Taxation and Finance allocated 100% of his income to New York State and New York City and issued notices of deficiency. The Department explained that "[a]ny allowance claimed for days worked outside of New York must be based on the performance of services which, because of the necessity of the employer, obligate the employee to out-of-state duties in the service of his employer. Such duties are those which, by their very nature, cannot be performed at the employer's place of business."

Petitioner paid the deficiencies under protest. After a conciliation conferee sustained the assessments, he took an administrative appeal seeking a refund. An administrative law judge sustained the notices of deficiency, and the Tax Appeals Tribunal affirmed. Petitioner then commenced this Article 78 proceeding in the Appellate Division pursuant to Tax Law § 2016. The Appellate Division confirmed the administrative determination and dismissed the petition (6 AD3d 988 [3d Dept 2004]).

II.

Tax Law § 601(e) imposes a tax on "income which is derived from *sources in this state* of every nonresident" (emphasis

added). Section 631(a)(1) of the Tax Law defines the "New York source income of a nonresident individual" as including "[t]he net amount of items of income, gain, loss and deduction entering into his federal adjusted gross income, as defined in the laws of the United States for the taxable year, *derived from or connected with New York sources*" (emphasis added). Tax Law § 631(b)(1)(B), in turn, provides that "[i]tems of income, gain, loss and deduction derived from or connected with New York sources shall be those items attributable to: ... (B) a business, trade, profession or occupation *carried on in this state*" (emphasis added).

The "carried on" language first appeared in the Tax Law in 1919, the year New York adopted an income tax (*see* L 1919, c 627). The 1919 law imposed a tax on "the entire net income and net capital gain ... from all property owned and from every business, trade, profession or occupation carried on in this state by natural persons not residents of the state" (former Tax Law § 351). The 1919 law also provided that "[i]n the case of taxpayers other than residents, gross income includes only the gross income from sources within the state" (former Tax Law § 359[3]). Other sections provided for deductions (former Tax Law § 360), exemptions (former Tax Law § 362) and credits (former Tax Law § 363) for nonresidents. The United States Supreme Court in *Travis v Yale & Towne Mfg. Co.* (252 US 60 [1920]) vindicated New York's nonresident income tax from charges that it violated the Commerce, Due Process and Equal Protection Clauses.[1]

Petitioner contends that sections 601 and 631 of the Tax Law preclude New York from taxing income attributable to work

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[1] The Court, however, held that an exemption that discriminated against nonresidents violated the Privileges and Immunities Clause (252 US at 80).

that he carried out for his New York employer in his Tennessee home office. Nothing in the Tax Law's legislative history, however, indicates whether the Legislature intended business "carried on in this state" and "sources in this state" to refer to the location of the employee or of the employer. Petitioner's assumption that these phrases signify the employee's place of performance traces to a 1919 opinion of the Attorney General construing the phrase "sources [of income] within the State" (1919 Report of Atty Gen 301). Attorney General Charles D. Newton opined that "[i]t seems to me that the work done, rather than the person paying for it, should be regarded as the 'source' of the income" (*id.*). He went on to conclude that "[w]here services are rendered partially within and partially without the State, the income therefrom should be divided pro rata into income from sources within and without the State" (*id.*).

In 1960, the Tax Law was recodified and reconfigured so as to allow taxpayers to use federal figures for their state returns (Message of the Governor, 1960 McKinney's Session Laws of NY, at 2026). Sections 601 and 631 were added and mirror, to a large extent, the language found in the predecessor statutes. Importantly, however, new language was folded into section 631 as subdivision (c). This subdivision, referring to New York source income of nonresidents, states that

> "[i]f a business, trade, profession or occupation is carried on partly within and partly without this state, as determined under regulations of the tax commission, the items of income, gain, loss and deduction derived from or connected with New York sources shall be determined by apportionment and allocation under such regulations."

The Legislature thus recognized the complexities of administering an income tax for a nonresident who works

both within and without the state, and left it up to the State Tax Commission, whose functions and duties in this regard were subsequently transferred to the Commissioner of Taxation and Finance (*see* L 1986, c 282), to develop a rule for apportionment and allocation.

This rule, the convenience of the employer test, provides that

> "[i]f a nonresident employee ... performs services for his employer both within and without New York State, his income derived from New York State sources includes that proportion of his total compensation for services rendered as an employee which the total number of working days employed within New York State bears to the total number of working days employed both within and without New York State. ... However, any allowance claimed for days worked outside New York State must be based upon the performance of services which of necessity, as distinguished from convenience, obligate the employee to out-of-state duties in the service of his employer" (20 NYCRR 132.18[a]).

When the convenience test first came into use is obscure; however, it was embodied in regulation by 1960, the tax year at issue in *Matter of Speno v Gallman* (35 NY2d 256 [1974]).[2]

In *Speno*, we addressed the language "sources within the state" (former Tax Law § 632) in relation to the taxation of the income of the nonresident president of a company with

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[2] The convenience test was formerly found at 20 NYCRR 131.16 (*see Speno*). The policy, if not the regulation, appears to have been in place since at least 1951, the tax year considered in *Burke v Bragalini* (10 AD2d 654 [3d Dept 1960]).

offices in New York and abroad. We endorsed a "refinement" of the Attorney General's 1919 "place of performance" opinion. That is, we accepted the Department's interpretation of the Tax Law in the convenience test, and held that "sources within the state" does not simply mean "place of performance." Rather, it calls for a more complicated analysis that takes into consideration why work is performed out of state. Our recent decision in *Matter of Zelinsky v Tax Appeals Trib.* (1 NY3d 85 [2003], *cert denied* 541 US 1009), which rejected challenges to the convenience test on federal due process and Commerce Clause grounds, was premised on our conclusion in *Speno* that the convenience test is a valid interpretation of the Tax Law.

Petitioner contends that while the convenience test as applied in *Speno* and *Zelinsky* may have comported with the Tax Law, his circumstances are different because he was not seeking to avoid or evade taxes. But our decisions in *Speno* and *Zelinsky* did not rest on any notion that these taxpayers were motivated to work at home to sidestep New York income tax liability. Further, although petitioner may not be in a position to commute physically into New York State each day to work,[3] he is the one who chose to accept employment from a New York employer (with the advantages of a New York salary and fringe benefits) while maintaining his residence in Tennessee, some 900 miles and

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[3] The taxpayer in *Speno* was arguably also unable to commute physically to his employer's New York workplace daily; he lived in Summit, New Jersey and his company's New York offices were located upstate in Ithaca and Syracuse. The taxpayer in *Zelinsky* lived in Connecticut and commuted to work in Manhattan.

a twohour plane trip distant from his New York employer's office.

In short, the statute facially evidences the Legislature's intent to tax nonresidents on all New York source income, and to task the Commissioner to develop a workable rule for apportioning and allocating the taxable income of nonresidents who work both within and without the State. The Commissioner has carried out his statutory responsibility by adopting the convenience of the employer test.

III.

Petitioner's due process challenge to the convenience test relies principally on Supreme Court cases involving taxes on interstate businesses (*see e.g. Wisconsin v J. C. Penney Co.*, 311 US 435, 441 [1940] [upholding from due process challenge tax on the "privilege of declaring and receiving dividends, out of income derived from property located and business transacted in (Wisconsin)"]; *Moorman Mfg. Co. v Bair*, 437 US 267 [1978] [upholding from due process challenge Iowa's "single-factor" formula for allocating interstate business income for tax purposes]; *Hans Rees' Sons v North Carolina*, 283 US 123 [1931] [invalidating under Commerce Clause tax on 84% of corporation's income where only 17% was sourced in North Carolina]). In *Matter of British Land v Tax Appeals Trib.* (85 NY2d 139 [1995]), we summarized this multistate business case law as follows:

> "[A] formula-based tax on income may be struck down if the income attributed to the State is in fact out of all appropriate proportions to the business transacted [by the taxpayer] in that State or if application of the apportionment formula has lead to a grossly distorted result. The taxpayer bears the burden of showing by clear and cogent evidence that

> [application of the formula] results in extraterritorial values being taxed (*id.* at 146 [internal quotations omitted]).

While instructive, these cases are not directly relevant to this appeal. Income derived from a business's interstate activities differs from income a nonresident earns from a New York employer --nonresidents do not implicate themselves or their employers in interstate commerce merely by working from home (*see Zelinsky*, 1 NY3d at 92-93), while interstate businesses are, by definition, engaged in interstate commerce. In order for these interstate business precedents to bear on petitioner's due process challenge to the convenience rule, we must tease out their Commerce Clause implications.[4]

The dormant Commerce Clause "prohibits state taxation, or regulation, that discriminates against or unduly burdens interstate commerce and thereby imped[es] free private trade in the national marketplace" (*GMC v Tracy*, 519 US 278, 287 [1997] [citations omitted]). A four-pronged test has developed over the course of the Supreme Court's Commerce Clause jurisprudence. A state tax on interstate commerce violates the dormant Commerce Clause unless it "is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State" (*Complete Auto Transit v Brady*, 430 US 274, 279 [1977] [upholding under Commerce Clause "a state tax for the privilege of carrying on, within a state, certain activities

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[4] We note that petitioner does not claim that application of the convenience rule in his case violates the Commerce Clause.

related to a corporation's operation of an interstate business"]).

The Commerce Clause's requirement of fair apportionment has been said to be a "principle of fair share ... which is threatened whenever one State's act of overreaching combines with the possibility that another State will claim its fair share of the value taxed" (*Oklahoma Tax Commn. v Jefferson Lines*, 514 US 175, 184 [1995] [holding superseded by statute]). "[T]he central purpose behind the apportionment requirement is to ensure that each State taxes only its fair share of an interstate transaction" (*Goldberg v Sweet*, 488 US 252, 260-61 [1989]).[5]

Shaffer v Carter (252 US 37 [1920]) is the Supreme Court's last decisive statement on a state's ability to tax the income of a nonresident as opposed to a business engaged in interstate commerce. There, the Court held that "just as a State may impose general income taxes upon its own citizens and residents whose persons are subject to its control, it may, as a necessary consequence, levy a duty of like character, and not more onerous in its effect, upon incomes accruing to

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[5] The "threat" of misapportionment is measured by two factors --internal and external consistency. "Internal consistency is preserved when the imposition of a tax identical to the one in question by every other State would add no burden to interstate commerce that intrastate commerce would not also bear" (*Oklahoma Tax Commn.*, 514 US at 185). External consistency looks to "the economic justification for the State's claim upon the value taxed, to discover whether a State's tax reaches beyond that portion of value that is fairly attributable to economic activity within the taxing State" (*id.*). The external consistency test asks "whether the State has taxed only that portion of the revenues from the interstate activity which reasonably reflects the instate component of the activity being taxed" (*Goldberg*, 488 US at 261).

non-residents from their property or business within the State, or their occupations carried on therein" (*id.* at 52).

Petitioner contends that the convenience rule violates due process because he is taxed out of all proportion to the benefits that he receives from New York. Accordingly, he asks us to engraft a proportionality requirement upon existing due process precedent. The Supreme Court, however, has established distinct Commerce Clause and due process restraints in its state taxation rules. Specifically, the Court has stated that the dormant Commerce Clause is "a means for limiting state burdens on interstate commerce" (*Quill Corp. v North Dakota*, 504 US 298, 313 [1992]). It is in this context that the apportionment standard was developed. If a State overreaches by taxing an activity that another state is also justified in taxing, the burden placed on interstate commerce is too great to withstand constitutional scrutiny.

Due process, on the other hand, is "a proxy for notice" (*id.*) and looks to the connection that must be present between the taxpayer and the taxing state before the state has authority to impose its power to tax (*see Northwestern States Portland Cement Co. v Minnesota*, 358 US 450 [1959]; *Quill*, 504 US 298, *supra*). All that is required to satisfy due process is some "minimal connection" between the taxpayer and the state, and that the income the state seeks to tax be "rationally related to values connected with" the state (*see Moorman Mfg. Co.*).

As the Commissioner argues, the convenience test is, in effect, a surrogate for interstate commerce. Where work is performed out of state of necessity for the employer, the employer creates a nexus with the foreign state and essentially establishes itself as a business entity in the foreign state. This nexus is often enough to expose the employer to corporate and sales and use taxes in the foreign

state (*see e.g. Amerada Hess Corp. v Director, Div. of Taxation, New Jersey Dept. of the Treasury*, 490 US 66 [1989] [finding substantial nexus between state and income from oil company's oil production which occurred entirely without the state because oil company had some operations in state and was a "unitary business"]). The convenience test stands for the proposition that New York will not tax a nonresident's income derived from a New York employer's participation in interstate commerce because in such a case, the nonresident's income would not be derived from a New York source.

In *Zelinsky*, we found the minimal connection called for by due process on account of the taxpayer's "physical presence in New York and because he ... purposefully availed himself of the benefits of an economic market in" New York (*Zelinsky*, 1 NY3d at 97 [quotations omitted]). Here, petitioner objects that, read and applied literally, the convenience of the employer test would allow New York to tax 100% of the income of a nonresident who worked out of his employer's place of business in New York just one day a year. He argues that due process demands proportionality in order to prevent this presumed overreaching. Whether due process would countenance this particular result --taxation of 100% of the income of a nonresident who spends a trivial amount of time working in New York --is simply not before us. We conclude that the minimal connection required by due process plainly exists in this case where petitioner accepted employment from a New York employer and worked in his employer's New York office approximately 25% of the time annually. Moreover, the amount of time that petitioner spent working in New York --25% --is significant enough to satisfy any rough proportionality requirement called for by due process.

As to whether New York's taxation of 100% of the nonresident's income was "rationally related" to values

connected with the State, in *Zelinsky* we noted the "host of tangible and intangible protections, benefits and values" New York provided to the taxpayer and his employer, and that these benefits were provided every day, regardless of whether the taxpayer chose to absent himself from New York (*id.* at 95). "New York may require contributions from [the taxpayer] because he thus realized current pecuniary benefits under the protection of the government, and *the tax imposed need not bear an exact relation* to the services actually provided to the individual taxpayer" (*id.* [emphasis added] [quoting *Matter of Tamagni v Tax Appeals Trib.*, 91 NY2d 530, 544 (1998)]). Certainly, the same may be said of petitioner.

Under the convenience of the employer test, New York taxes a nonresident employee's income from a New York employer except to the extent the income is connected with the employer's participation in interstate commerce. By taxing only income sourced to New York, the convenience test is rationally related to values connected with New York because New York has the right to tax 100% of a nonresident employee's income derived from New York sources. Where a nonresident employee must perform work out of state for the employer's necessity, a nexus is created between the employer and the foreign state. New York does not tax the nonresident employee's income derived from these activities, which are properly sourced to the foreign state. Thus, the convenience test constitutes an across-the-board standard designed to comply with both due process and the Commerce Clause.[6]

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[6] The dissent fails to acknowledge the two factors that drive our analysis and our conclusion that due process is not offended when New York taxes all of petitioner's income from his New York employer. First, nonresident individuals are simply not the same as interstate businesses,

(continued...)

IV.

Nordlinger v Hahn (505 US 1 [1992]) established the equal protection standard for tax cases:

> "the Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational" (*id.* at 11-12 [citations omitted]).

Further, "[a]bsolute equality is impracticable in taxation, and is not required by the equal protection clause .... [I]nequalities that result not from hostile discrimination, but occasionally and incidentally in the application of a system that is not arbitrary in its classification, are not sufficient to defeat the law" (*Maxwell v Bugbee*, 250 US 525, 543 [1919]).

Petitioner argues that the convenience test impermissibly discriminates between those employees who work out of state for personal convenience and those who work out of state as a necessity. New York distinguishes between these

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and these differences must be taken into account when considering whether a tax meets with due process. Second, the purposes and scope of the Due Process and Commerce Clauses are not coextensive and, as the Supreme Court has held, a tax can burden interstate commerce without violating due process (*see Quill*).

two classes of nonresidents because by doing so, it properly taxes nonresidents only on income sourced to New York, and, concomitantly, avoids taxing income derived from interstate commerce. This classification, which is designed to comply with both the Commerce Clause and the Due Process Clause, is therefore rational in every respect.

Petitioner criticizes the convenience test as unfair and unsound as a matter of tax policy and a discouragement to telecommuting. Maybe so. We do not view it as our role, however, to upset the Legislature's and the Commissioner's considered judgments so long as the convenience test has been constitutionally applied in this case. For all the reasons given, we conclude that the convenience test as applied to petitioner complies with the requirements of due process and equal protection.

Finally, we agree with the Appellate Division that petitioner is not a prevailing party entitled to recover litigation and administrative costs pursuant to Tax Law § 3030. Accordingly, the judgment of the Appellate Division should be affirmed, with costs.

Matter of Huckaby v New York State Division of Tax Appeals, Tax Appeals Tribunal, et al.

No. 8

R. S. Smith, J. (dissenting):

The issue here is to what extent the salary paid by a New York employer to a resident of another state who works most of his time outside, and beyond commuting distance from, New York is subject to New York State income tax. The majority holds that 100 percent of the employee's income is

taxable in New York, so long as (1) any significant part of the employee's work is performed in New York and (2) the employer does not require the employee to work outside New York. I dissent, because I believe that the application of this rule to this case is contrary to the Tax Law, and that the Tax Law as interpreted by the majority violates the Due Process Clause of the United States Constitution.

I

Tax Law § 601 (e) imposes a tax on "the taxable income which is derived from sources in this state" of nonresident individuals. Tax Law § 631 uses the words "New York source income," "income from New York sources" and "income ... derived from ... New York sources" to identify the same concept. These interchangeable terms are defined by Tax Law § 631 (b) (1), which lists four categories of "New York source income"; only one of the four is relevant to this case. Tax Law § 631 (b) (1) (B) includes as "New York source income" that income which is "attributable to ... a business, trade, profession or occupation carried on in this state." The statutory issue in this case is how much of Thomas Huckaby's income is in that category.

Huckaby argues that, since only 25 percent of his "business, trade, profession or occupation" is "carried on in this state," only 25 percent of his income is subject to tax under the Tax Law. The Commissioner seeks to tax 100 percent of it, relying on the "convenience" regulation (20 NYCRR 132.18), which provides that income will be allocated to New York in proportion to the days worked there, but that "any allowance claimed for days worked outside New York State must be based upon the performance of services which

of necessity, as distinguished from convenience, obligated the employee to out-of-state duties in the service of his employer." I think the convenience rule as applied to Huckaby is inconsistent with the Tax Law, because the rule does not here, as it does in other cases, serve the legitimate purpose of avoiding manipulation or fraud; and because there is no other good reason for attributing the part of Huckaby's income that is earned in Tennessee to "a business, trade, profession or occupation carried on in this state." Thus, I would hold that Huckaby is correct in asserting that only 25 percent of his income is taxable in New York.

We have previously upheld the application of the Commissioner's convenience rule to permit New York to tax income paid for work done outside New York (*Matter of Speno v Gallman* [35 NY2d 256 (1974)]; *Matter of Zelinsky v Tax Appeals Tribunal* [1 NY3d 85 (2003)]). *Speno* and *Zelinsky* rest, however, on the proposition that an employee's discretionary decision to do work at home rather than in the office should not have significant tax consequences; if the rule were otherwise, the door would be open to abuse. This rationale does not support the application of the Commissioner's rule to Huckaby.

The taxpayer in *Speno*, Frank Speno, Jr., was employed as president of the Frank Speno Railroad Ballast Cleaning Co., Inc., which had its principal office in Ithaca, New York. He lived in Summit, New Jersey. In his 1960 and 1961 tax returns, he claimed to have worked 106 days at his home in 1960, and 174 days in 1961. We observed that "the work performed at home in New Jersey consisted essentially of making phone calls. No business calls were received on the unlisted New Jersey number, and Mr. Speno entertained no business contacts in New Jersey" (35 NY2d at 258). In upholding the application of the "convenience" test to reject Speno's allocation of income to his days worked in New Jersey, we explained:

> "The policy justification for the 'convenience of the employer' test lies in the fact that since a New York State resident would not be entitled to special tax benefits for work done at home, neither should a nonresident who performs services or maintains an office in New York State."

(*Id.* at 259.)

In *Zelinsky*, the taxpayer was a professor at Cardozo Law School who did all his teaching in New York City, and commuted there from his Connecticut home three days a week. On the other two days, "he stayed at home, where he prepared examinations, wrote student recommendations, and conducted scholarly research and writing" (1 NY3d at 89). He also "worked exclusively at home" when school was not in session, and when he was on sabbatical leave (*id.*). In rejecting his attempt to allocate much of his law school salary to work done outside New York, we noted that a contrary ruling would allow the taxpayer to manipulate the system. We said:

> "The convenience test was originally adopted to prevent abuses arising from commuters who spent an hour working at home every Saturday and Sunday and then claimed that two sevenths of their work days were non-New York days and that two sevenths of their income was thus non-New York income, and either free of tax (if the state of their residence had no income tax) or subject to a lower rate than New York's. In the present case, the taxpayer's efforts to reduce the amount of tax owed to New York on his New York source income earned during the work week raise similar concerns."

(*Id.* at 92 [footnotes omitted].)

Although there was no suggestion in either *Speno* or *Zelinsky* that the taxpayer was not telling the truth, of course not all taxpayers are so scrupulous. We noted in *Zelinsky* that "in the absence of the convenience test, opportunities for fraud are great and administrative difficulties in verifying whether an employee has actually performed a full day's work while at home are readily apparent" (*id.* n 4). We also remarked that "the test 'serves to protect the integrity of the apportionment scheme by including income as taxable' when the income results from services derived from New York sources performed out-of-state 'to effect a subterfuge' (*Matter of Colleary v Tully*, 69 AD2d 922, 923 [3d Dept 1979])" (*Zelinsky*, 1 NY3d at 92 n 5).

In short, in *Speno* and *Zelinsky*, we justified the application of the "convenience" test on the ground that not to apply the rule would facilitate tax avoidance or evasion. That is not true here. Huckaby does not work in Tennessee to avoid New York taxes; he works there because that is where he lives. There is no undue difficulty in verifying his claim that three quarters of his working days are spent in Tennessee. While it might be said that he chooses to work in Tennessee for his own "convenience" in the sense that he could, if he wished, uproot his family and move to or near New York, a choice based on that sort of "convenience" is not subject to the sort of manipulation about which we expressed concern in *Speno* and *Zelinsky*.

Thus, the Commissioner cannot prevail here unless he offers some justification other than the prevention of abuse for treating 100 percent of Huckaby's income as "New York source income." He has not succeeded in finding such a justification.

The Commissioner argues that Huckaby's income comes from "a business, trade, profession or occupation carried on in this state" and is therefore "New York source income" on

the ground that the business of Huckaby's *employer* is "carried on" in New York. The majority artfully avoids either embracing or rejecting this argument; it raises, but does not answer, the question of whether "the Legislature intended business 'carried on in this State' ... to refer to the location of the employee or of the employer" (Opinion at 6). I think the Commissioner's argument is completely untenable.

The natural and obvious reading of the words in Tax Law § 631 (b) (1) (B), "a business, trade, profession or occupation carried on in this state," is "a business, trade, profession or occupation" that is "carried on" *by the taxpayer*. As the majority notes (Opinion at 6), these words were so read in an Attorney General's opinion contemporaneous with the enactment of the statute in 1919 (1919 Report Atty Gen 301 ["(T)he work done, rather than the person paying for it, should be regarded as the 'source' of the income"]). We endorsed this reading in *Matter of Oxnard v Murphy* (15 NY2d 593 [1964], *affg un op below* 19 AD2d 138, 140 [3d Dept 1963]). *See also Matter of Linsley v Gallman*, (38 AD2d 367, 370 [3d Dept 1972], *affd*, 33 NY2d 863 [1973]); *Matter of Hayes v State Tax Commission* (61 AD2d 62, 63 [3d Dept 1978]).

Yet the Commissioner, without citing authority, and ignoring our decision in *Oxnard*, asserts that "in determining whether a nonresident *employee* who works both inside and outside New York is earning income from New York sources, the business 'carried on' in New York refers to the business of the employer" (emphasis added). The Commissioner does not dispute that, as to non-employees --i.e., independent contractors --the location of the taxpayer's work is dispositive. The Commissioner's theory not only contradicts the apparent meaning of the statute and our prior interpretation of it; it is riddled with logical flaws.

First, what language in the statute even hints at a distinction between employee taxpayers and others of the kind the Commissioner advocates? Secondly, what indication is there in the background or legislative history of the statute that the Legislature had any such intention? Thirdly, if the relevant location is that of the employer and not the employee, why does the Commissioner's own regulation make the place of performance of the employee's duties the governing factor, as a general rule to which the "convenience" test is an exception? And finally, if he really believes his reading of the statute is sound, why does the Commissioner not carry it to its logical conclusion, by trying to tax the salaries of all out-of-state employees of New York-based firms?

The Commissioner attempts to answer only the last of these questions, and his answer to that one is completely unpersuasive. He suggests that taxing employees who work out of state for reasons other than convenience might violate the Commerce Clause, but he does not support this suggestion with either reasoning or authority. (The majority, in dealing with the constitutional issue in this case, adopts a version of the Commissioner's "Commerce Clause" theory, which I discuss below.)

In short, the view that "carried on in this state" means "carried on by the taxpayer's employer" is without merit. Thus, the only two possible rationales for treating all of Huckaby's income as "New York source income" within the meaning of the statute --the "avoidance of abuse" rationale and the "location of the employer" rationale --clearly fail. The majority upholds the Commissioner's position here without approving either of these two rationales for it, and without suggesting a third one. The majority makes no attempt to offer any justification, in the words of the statute or in the policy underlying it, for holding that 100 percent of Huckaby's income is taxable in New York.

The majority's sole ground for holding that Huckaby's income is "New York source income" is that the Commissioner says it is. The majority says that the Legislature "recognized the complexities" of taxing those who work both within and outside the State (Opinion at 7), and "task[ed] the Commissioner to develop a workable rule" (Opinion at 9). No doubt. But the Commissioner's rule is still supposed to make sense (*New York State Assn. of Counties v Axelrod*, 78 NY2d 158, 166 [1991] [a state regulation should be upheld only if it has a rational basis and is not unreasonable, arbitrary, capricious or contrary to the statute under which it was promulgated]; *Jones v Berman*, 37 NY2d 42, 53 [1975] ["(a)dministrative agencies can only promulgate rules to further the implementation of the law as it exists; they have no authority to create a rule out of harmony with the statute"]). As applied to Huckaby, the Commissioner's convenience rule does not make sense.

I would hold that only 25 percent of Huckaby's income is "New York source income" within the meaning of the Tax Law.

II

Since the majority holds that the Tax Law permits New York to tax the 75 percent of Huckaby's income that he earned by work done in Tennessee, the Court must decide whether the Tax Law, as so interpreted, is valid under the Due Process Clause. I would hold that it is not, and I therefore dissent on constitutional as well as on statutory gounds.

The basic due process limitation on a state's taxing power is that jurisdiction to tax is limited by the state's borders. To take a simple example, it would be an obvious violation of the Due Process Clause if New York sought to levy a real property tax on the Tennessee home in which Huckaby lives. Or, to move a step closer to this case, if Huckaby owned four

parcels of real property --one in New York and three in Tennessee --due process would permit New York to collect real property tax only on the New York property, not on the other three. Huckaby's argument is, essentially, that an income tax on his salary is subject to a similar limitation, and that New York is free to tax only the one quarter of his salary that he earns in New York. I believe this argument is correct.

As we noted in *Zelinsky*, under the Due Process Clause "[a] state ... may not tax value earned outside its borders" (1 NY3d at 96, citing *Allied-Signal, Inc v Director, Division of Taxation*, 504 US 768, 777 [1992]). This general principle has been implemented by a two-part test, which we summarized in *Zelinsky* as follows:

> "The Due Process Clause places two restrictions on a state's power to tax income generated by interstate activities. First, it 'requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax' (*Quill Corp. v North Dakota*, 504 US 298, 306 [1992] [citation omitted]). Second, the 'income attributed to the State for tax purposes must be rationally related to values connected with the taxing State' (*Moorman* [*Mfg. Co. v Bair*], 437 US[267] at 273 [1978] [citation and internal quotation marks omitted])."

(1 NY3d at 96.)

The first part of the two-part test is met here. Huckaby works one quarter of his time in New York, and therefore has a "minimum connection" to the State. Huckaby does not challenge New York's power to tax him. Rather, relying on the second part of the test, he challenges the State's power to tax more than the one quarter of his income earned in New York. He argues that a tax on 100 percent of his income is

not "rationally related to" the 25 percent of his time spent working in the state.

United States Supreme Court precedent, and our own, establish that a tax is not "rationally related to values connected with the taxing state" unless it bears some reasonable proportion to those values. Thus in *Hans Rees' Sons, Inc v North Carolina* (283 US 123 [1931]), the Supreme Court held that North Carolina's income tax was invalid under the Due Process Clause as applied to a particular taxpayer because the state taxed as much as 85 percent of the taxpayer's income, of which only some 17 percent was attributable to that state. The Supreme Court said:

> "It is sufficient to say that, in any aspect of the evidence, and upon the assumption made by the state court with respect to the facts shown, the statutory method, as applied to the appellant's business for the years in question operated unreasonably and arbitrarily, in attributing to North Carolina a percentage of income *out of all appropriate proportion* to the business transacted by the appellant in that state. In this view, the taxes as laid were beyond the state's authority. *Shaffer v. Carter*, 252 U.S. 37, 52, 53, 57, 40 S. Ct. 221, 64 L. Ed. 445."

(283 US at 135 [emphasis added].)

The existence of a proportionality requirement under the Due Process Clause was reaffirmed in *Moorman Mfg. Co. v Bair* (437 US 267 [1978]). The court upheld the tax in that case, noting that "the States have wide latitude in the selection of apportionment formulas," but, quoting from *Hans Rees' Sons*, said that a tax is invalid under the Due Process Clause where "the income attributed to the State is in fact 'out of all appropriate *proportion* to the business transacted ... in that

State' ... ." (437 US at 274 [emphasis added]). (*See also Zelinsky*, 1 NY3d at 97 [incorporating by reference into Due Process Clause analysis aspects of our analysis under the Commerce Clause]). Thus I see no basis for the majority's suggestion that the Due Process Clause does not require proportionality (*see* Opinion at 12 [Huckaby "asks us to engraft a proportionality requirement upon existing due process precedent"]; 14 ["any rough proportionality requirement called for by due process"]).

It also seems to me beyond question that the tax in this case --applied to 100 percent of Huckaby's income --is out of all proportion to the time he spent working in New York --25 percent. Again, I see no basis for the majority's view that, while it might be disproportionate to tax 100 percent of Huckaby's income if he spent only a "trivial" percentage of his time in New York, "the amount of time that petitioner spent working in New York --25% --is significant enough to satisfy any rough proportionality requirement ...." (Opinion at 14). I do not think it can plausibly be argued that, while one percent would not be close enough to 100 percent to be "proportional," 25 percent is close enough. Even if this proposition were not indefensible on its face, it is surely inconsistent with the Supreme Court's holding in *Hans Rees' Sons* that 17 percent was not close enough to 85 percent.

As I read the majority opinion, it does not rely primarily on the unsupportable argument that the Due Process clause's requirement of proportionality is either non-existent or so weak that 25 percent can be called roughly equivalent to 100 percent. The main basis for the majority's holding that a tax on 100 percent of Huckaby's income is "rationally related to values connected with" New York is the majority's theory that the entity that pays Huckaby's salary, his employer, is a "value" on which jurisdiction to tax may be based, and this "value" is located 100 percent in New York. This theory, unsupported by any precedent, is a radical departure from

long-accepted limits on the powers of states to tax nonresidents.

Since state income taxes on nonresidents were first upheld in *Shaffer v Carter* (252 US 37 [1920]), such taxes have been levied on income derived either from work done within the state, or from property located in, or sent into, the state. I am aware of no case in which it has been held, or even argued, that an in-state source of payment for services done outside the state is a constitutionally valid basis for taxing the recipient of the payment. Nor am I aware of any state statute --other than New York's Tax Law as interpreted by the majority in today's decision --that attempts to levy nonresident income tax on this basis. This obviously does not reflect any reticence by states in seeking to collect taxes; they are not reticent. A statement issued by the Multi-State Tax Commission contains the unsurprising assertion: "It is the policy of the state signatories hereto to impose their net income tax, subject to state and federal legislative limitations, to the fullest extent constitutionally permissible" (Statement of Information Concerning Practices of Multistate Tax Commission and Signatory States under Public Law 86-272 (July 29, 1994), J. Hellerstein and W. Hellerstein, *State Taxation* at App D-1).

Until today's decision, it has been universally assumed that an in-state entity that pays a taxpayer's salary is not, in itself, in-state "value" for due process purposes. The majority's departure from this assumption has potentially troubling consequences. If the location of a taxpayer's employer is taxable "value", there is no reason in principle why New York may not tax all out-of-state employees of New York firms --for example, a New York company's California sales manager, or a secretary who works in a New York law firm's Boston office. And other states can return the compliment, applying their own income taxes to New York residents who work for firms headquartered in California or Massachusetts.

The result could be "an inequitable and perhaps ruinously overlapping scramble" for tax dollars (*see American Insurance Association v Lewis*, 50 NY2d 617, 624 [1980]).

The majority, perhaps aware of this danger, seemingly feels a need to limit the implications of its holding that an employee is subject to income tax in the state where his employer is located. Thus the majority, if I am correctly interpreting its opinion, comes up with a novel Commerce Clause theory as a companion to its novel due process theory. The Commerce Clause, the majority seems to be saying, will prevent states from taxing in-state companies' out-of-state employees --except those employees who, like Huckaby, work outside the state for their own "convenience." In other words, the majority advances a rule of constitutional law that is identical to the Commissioner's convenience regulation. As the majority puts it, "the convenience test is, in effect, a surrogate for interstate commerce" (Opinion at 13).

The majority cites no authority at all, and offers no persuasive reason, in support of this new interpretation of the Commerce Clause. It may be true that, "[w]here work is performed out of state of necessity for the employer, the employer creates a nexus with the foreign state," which may be "enough to expose the employer corporate sales and use tax in the foreign state" (Opinion at 13). But why should this have any impact on the power of the employer's home state to levy income tax on nonresident employees? What is the source of, or the reason for, a rule that says, in effect: "If Tennessee can tax a New York company, New York loses the right to tax that company's Tennessee employees"? It is simply not true that, as the majority suggests, "in such a case, the nonresident's income would not be derived from a New York source" (Opinion at 14). On the contrary, the majority's assumption that the New York company is involved in interstate commerce would if anything support the argument

that the company's Tennessee employees are getting income from a New York source. The word "interstate" seems to imply a source in one state and a recipient in another.

It is evident, I suggest, that the majority's constitutionalizing of the Commissioner's convenience rule is based on a different kind of "convenience": it conveniently allows New York State to tax telecommuters like Huckaby. I see no other basis for rules of constitutional law to the effect that (1) due process permits a state to tax income earned out of state by nonresident employees of local employers, but (2) the Commerce Clause forbids such taxation except where the employee works out of state for his own convenience. I believe the majority errs in adopting these rules.

III

Accordingly, I would reverse the order of the Appellate Division and hold that the Commissioner may not tax that portion of Huckaby's salary earned outside the State of New York.

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Judgment affirmed, with costs. Opinion by Judge Read. Chief Judge Kaye and Judges Rosenblatt and Graffeo concur. Judge R.S. Smith dissents and votes to reverse in an opinion in which Judges G.B. Smith and Ciparick concur.

Decided March 29, 2005

In the Matter of THOMAS L. HUCKABY, Petitioner, v NEW YORK STATE DIVISION OF TAX APPEALS, TAX APPEALS TRIBUNAL, et al., Respondents.

MEMORANDUM AND JUDGMENT

March 24, 2004

Before: Cardona, P.J., Mercure, Carpinello, Mugglin and Rose, JJ.

McDermott, Will & Emery, New York City (Peter L. Faber of counsel), for petitioner.

Eliot Spitzer, Attorney General, Albany (Julie S. Mereson of counsel), for Commissioner of Taxation and Finance, respondent.

Cardona, P.J.

Proceeding pursuant to CPLR article 78 (initiated in this Court pursuant to Tax Law §2016) to review a determination of respondent Tax Appeals Tribunal which sustained an assessment of personal income tax imposed under Tax Law article 22.

Petitioner is a resident of Tennessee. Until 1991, he was employed as a computer programmer by a Tennessee-based employer, where his duties included providing services to the National Organization of Industrial Trade Unions (hereinafter NOITU), an organization based in Jamaica, Queens County. After he left that employment in 1991, NOITU hired him to continue providing computer

programming services in support of its New York operations. Petitioner and NOITU agreed that he would work primarily from his home in Tennessee, however, he would travel to New York as needed.

In 1994 and 1995, petitioner spent approximately 25% of his time working in New York.[1] Petitioner and his wife filed 1994 and 1995 New York nonresident income tax returns, apportioning his income between New York and Tennessee to reflect the number of days he spent working in each state. However, the Department of Taxation and Finance (hereinafter Department) determined that 100% of petitioner's income was allocable to New York and issued notices of deficiency for those tax years. After the Department's assessments were upheld at a conciliation conference, petitioner filed a petition for redetermination, contending that the Department's allocation of his income was inconsistent with relevant statutes and regulations and otherwise unconstitutional. The parties waived a hearing and an Administrative Law Judge denied the petition. Respondent Tax Appeals Tribunal affirmed the tax assessment and this proceeding ensued.

New York taxes the income of nonresidents to the extent that income is "derived from or connected with New York sources" (Tax Law §631 [b] [1]; *see* Tax Law §601 [e]), including any income attributable to "a business, trade, profession or occupation carried on in this state" (Tax Law §631 [b] [1] [B]). When a nonresident earns income from work performed both within and outside of New York, the portion of income that can be taxed by New York is determined by allocating the total number of days worked to

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[1] In 1994, petitioner worked in New York for 59 days and in Tennessee for 187 days. In 1995, he worked in New York for 62 days and in Tennessee for 180 days.

the various states and apportioning the nonresident's income accordingly (*see* Tax Law §631 [c]; 20 NYCRR 132.18). However, under the "convenience of the employer" test, a nonresident who worked both within and outside New York can allocate days worked outside New York to other states only if the services were performed outside New York due to the necessity of the employer, rather than for the employee's convenience (*see* 20 NYCRR 132.18 [a]; *see also Matter of Zelinsky v Tax Appeals Trib. of State of N.Y.*, 1 NY3d 85, 90 [2003]; *Matter of Speno v Gallman*, 35 NY2d 256, 259 [1974]).

In this proceeding, the parties have stipulated that petitioner's employer did not require him to work in Tennessee and he chose to do so for personal reasons. Under these circumstances, the Department applied the "convenience of the employer" test and determined that the income earned from work in Tennessee was taxable by New York because it was not performed in Tennessee due to the necessity of his New York employer.

On the other hand, petitioner contends that the "convenience of the employer" test is inconsistent with Tax Law §631. He argues that this statute authorizes the state to tax only the portion of a nonresident's income that is derived from work "carried on" in New York (*see* Tax Law §631 [b] [1] [B]) and, thus, regulations implementing this statute must focus on the location where the work is performed, rather than on the location or demands of the employer. It is clear, however, that New York's tax statutes are intended to impose tax on any nonresident income "derived from sources in this state" (Tax Law §601 [e]; *see* Tax Law §631 [a]), and the Court of Appeals has upheld the "convenience of the employer" test as a valid means of capturing income derived from work performed for New York employers (*see Matter of Speno v Gallman, supra* at 258-260; *see also Matter of Kitman v State Tax Commn.*, 92 AD2d 1018 [1983], *lv denied* 59

NY2d 603 [1983]), such as the income at issue here. Therefore, we find that the "convenience of the employer" test is not inconsistent with Tax Law §631.

Turning to petitioner's constitutional claims, he sets forth that the imposition of nonresident income tax on 100% of his income violates his due process and equal protection rights. Under the Due Process Clause, a state is permitted to tax income from interstate activities only when "there is some minimal connection between those activities and the taxing State" and "the income attributed to the State for tax purposes [is] rationally related to `values connected with the taxing State' " (*Moorman Mfg. Co. v Bair*, 437 US 267, 272-273 [1978], quoting *Norfolk & W. Ry. Co. v Missouri State Tax Commn.*, 390 US 317, 325 [1968]; *see Quill Corp. v North Dakota*, 504 US 298, 306 [1992]). Here, petitioner concedes that there is a nexus with New York sufficient to support taxation of his income, but maintains that the tax on 100% of his income is not rationally related to the benefits he derives from New York.

We disagree. "[T]he State's power to tax an individual's * * * activities is justified by the `protection, opportunities and benefits' the State confers on those activities' " (*Allied-Signal, Inc. v Director, Div. of Taxation*, 504 US 768, 778 [1992], quoting *Wisconsin v J.C. Penney Co.*, 311 US 435, 444 [1940]). As a result, the Court of Appeals recently rejected a due process challenge to the "convenience of the employer" test, finding that a nonresident employee benefits not only from the opportunity to earn a salary in New York, but also from the "host of tangible and intangible protections, benefits and values" that New York provides to the employer which enable that salary (*Matter of Zelinsky v Tax Appeals Trib. of State of N.Y.*, 1 NY3d 85, 95 [2003], *supra*; *see id.* at 97; *see also Shaffer v Carter*, 252 US 37, 51 [1920]). Petitioner similarly derives benefits from New York and,

thus, there is ample justification for the state to tax the income he derives from New York.

Turning to petitioner's equal protection claim, we note that New York's reliance on the "convenience of the employer" test to apportion nonresident income is rationally related to its legitimate interest in taxing nonresident income derived from New York sources (*see Matter of Speno v Gallman*, 35 NY2d 256, 259 [1974], *supra*; *Matter of Colleary v Tully*, 69 AD2d 922, 923 [1979]). Accordingly, we conclude that petitioner has not been deprived of equal protection by virtue of this tax scheme (*see Nordlinger v Hahn*, 505 US 1, 11-12 [1992]).

Finally, because petitioner has not prevailed on his substantive claims, his application for administrative and litigation costs pursuant to Tax Law §3030 was properly denied (*see City of New York v State of New York*, 94 NY2d 577, 598 [2000]).

Mercure, Carpinello, Mugglin and Rose, JJ., concur.

ADJUDGED that the determination is confirmed, without costs, and petition dismissed.

New York Division of Tax Appeals, Tax Appeals Tribunal,

DTA No. 817284, May 30, 2002.

Petitioner Thomas L. Huckaby, 124 Taggart Avenue, Nashville, Tennessee 37205-4427, filed an exception to the determination of the Administrative Law Judge issued on February 8, 2001. Petitioner appeared by McDermott, Will and Emery (Peter L. Faber, Esq., of counsel). The Division of Taxation appeared by Barbara G. Billet, Esq. (Jennifer L. Hink, Esq., of counsel).

Petitioner filed a brief in support of his exception. The Division of Taxation filed a brief in opposition and petitioner filed a reply brief. Oral argument, at petitioner's request, was heard on December 12, 2001 in New York, New York.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

I. Whether Tax Law §631(b) permits the Division of Taxation to tax a nonresident on compensation for services that are performed out of state.

II. Whether application of the convenience of the employer test results in the taxation of income out of all proportion to petitioner's contacts with, and benefits from, New York State in violation of the United States Constitution.

III. Whether the Division of Tax Appeals should award petitioner reasonable administrative and litigation costs, including attorney's fees.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Petitioner, Thomas L. Huckaby was domiciled in Nashville, Tennessee. He did not maintain a permanent place of abode in New York State nor did he spend more than 183 days in New York State in either of the years in issue. He was not a resident of New York State within the meaning of section 605(b) of the Tax Law.

Petitioner was an employee of Multi-User Computer Solutions ("MCS") of Nashville, Tennessee, from 1983 until July 1991. He lived and worked in Nashville during this period and was domiciled in Tennessee.

MCS was engaged in the business of developing and selling computer software.

Petitioner's duties for MCS consisted of developing and servicing computer programs and advising MCS's customers with respect to their use.

Petitioner has a Bachelor of Science degree with a major in accounting. Before his MCS employment, petitioner developed and implemented a Basic Language payroll program and a Medicare/insurance billing program while working as controller for a Tennessee home healthcare agency. While working for MCS he developed an expertise in computer programming and transitioned from a single-user to a multi-user computer environment. Subsequent to petitioner's MCS employment, he received training in and developed computer applications using SQL, Oracle Forms 3.0, and Reportwriter 1.0.

The National Organization of Industrial Trade Unions ("NOITU") is an umbrella organization of which industrial trade unions are members. It provides various administrative services for its member unions. Among its services are to administer health claims payment, medical centers, and pension programs for members of its member unions.

NOITU invoices the employers of members of its member unions for welfare, dues, and pension fund contributions. Monies collected from the employers are used for the benefit of NOITU's member unions through the various fringe benefit programs that NOITU administers.

NOITU was a client of MCS before July 1991. MCS developed computer software that NOITU used in administering its fringe benefit programs.

Petitioner, as part of his duties for MCS, worked on matters for NOITU and dealt directly with NOITU's personnel.

In 1991, MCS underwent a business reorganization that resulted in the termination of petitioner's employment with MCS.

NOITU needed a programmer with petitioner's skills and, accordingly, it hired petitioner as an employee in 1991.

Petitioner and NOITU agreed that petitioner, who had served NOITU from Nashville in the past, would continue to be based in Nashville. His duties consisted of continuing to support the Basic Language programs that MCS had written for NOITU on a BTI computer; assisting the New York computer department manager in selecting a replacement computer, operating system, and application programming language; writing interface programs that facilitated the transfer of data from the old BTI computer to a new IBM computer; rewriting the health claims payment program in

the Oracle SQL computer language; writing new pension tracking and annual reporting programs; and supporting all other computer programming areas, including membership maintenance, employer billing, and medical center applications.

NOITU's office was in Jamaica, New York. It also operated two medical centers, one in Manhattan and one on Long Island.

Petitioner and NOITU agreed that petitioner would come to NOITU's New York office only when needed to gather guidelines for revision of existing or creation of new computer programs, and to instruct NOITU's New York personnel in their use. In May of 1995, petitioner spent 19 working days in New York to assist with the one-time conversion from the BTI to the IBM computer.

Working as an employee of NOITU was petitioner's only business activity during the years at issue. He did not work for any other person or organization, either as an employee or as an independent contractor.

Petitioner set up an office in his home in Nashville to perform duties for NOITU. NOITU arranged with MCI Telephone Company to install a long-distance data line from its Jamaica, New York office to petitioner's Nashville office. Petitioner had a dedicated voice telephone that he used solely for business purposes. He had another telephone line for personal calls. Petitioner's Nashville office consisted of one room in his home. In addition to the MCI communication equipment, the office included two computer terminals, which were later replaced with a personal computer and a printer. Petitioner had his own desk but NOITU paid for a desk chair, a dry-mount wall board, and two 30&inch;´72&inch;work tables. Office expenses, including a

telephone and supplies, were reimbursed to petitioner by NOITU on a monthly basis.

Most of petitioner's computer programming work was done in Nashville. He traveled to New York for the purpose of instructing NOITU's New York personnel in the use of new or revised computer programs.

NOITU did not require petitioner to perform his work in Nashville. It would not have objected if he had performed it in New York. Petitioner's decision to do his programming work in Nashville rather than New York was made for personal reasons.

Petitioner's work for NOITU did not involve any administrative responsibilities for the New York office nor did he supervise New York personnel or have any involvement in the running and the management of the New York office. His work involved preparing and revising computer programs that were used by NOITU and instructing NOITU's personnel in their use. In the course of his work he was in daily contact with NOITU's New York office by telephone.

Petitioner was not an officer or member of the board of directors of NOITU. He owned no stock or any other equity interest in NOITU, nor did he lend any money to NOITU.

Nashville is 900 miles from New York City. Published airline schedules indicate that a flight from Nashville to New York takes about two hours.

In a typical week, petitioner spent approximately 45 hours working for NOITU. Most of his work was done at his office in Nashville.

During 1994, petitioner worked 187 days in Tennessee and 59 days in New York.

During 1995, petitioner worked 180 days in Tennessee and 62 days in New York.

When petitioner came to New York on NOITU business, he stayed in a hotel near NOITU's office.

In 1994, petitioner came to New York eight times. His average stay was eight work days and his longest stay was ten work days.

In 1995, petitioner came to New York eight times. His average stay was 8 work days and his longest stay was 19 work days.

Petitioner filed timely Federal income tax returns for 1994 and 1995.

Petitioner filed timely New York State personal income tax returns for 1994 and 1995. On each return, petitioner allocated his wage and salary income to New York on the basis of the total number of days worked in New York over the total number of days worked in the year.

On or about November 28, 1997, the Audit Division of the Division of Taxation ("Division") mailed to petitioner statements of proposed audit changes for 1994 and 1995 which explained that there were deficiencies of New York State and New York City personal income tax. For each of the years in issue, the Division explained, in part, that days worked at home do not form a proper basis for allocation of income by a nonresident. According to the Division, "any allowance claimed for days worked outside of New York must be based on the performance of services which, because of the necessity of the employer, obligate the

employee to out-of-state duties in the service of his employer." Upon applying this principle, the Division allocated the total amount reported by petitioner as wages, salaries and tips from his New York employment to New York State and New York City.

On or about April 6, 1998 and April 27, 1998, the Division mailed to petitioner notices of deficiency which asserted deficiencies of New York State and New York City personal income taxes as follows:

Date of Notice	Jurisdiction	Year	Amount of Tax	Interest	Balance Due
April 6 1998	N.Y.S.	1994	$2,204.91	$590.88	$2795.79
	N.Y.C.	1994	$202.53	$54.28	$256.81
April 27, 1998	N.Y.S.	1995	$2,182.66	$378.18	$2,560.84
	N.Y.C.	1995	$202.94	$35.16	$238.10

A conciliation conference was held on this matter before the Department of Taxation and Finance's Bureau of Conciliation and Mediation Services on March 16, 1999. On or about June 4, 1999, the Bureau of Conciliation Services mailed to petitioner a Conciliation Order sustaining the deficiencies proposed in the notices of deficiency.

On or about August 26, 1999, petitioner mailed to the Division of Tax Appeals a petition disagreeing with the proposed deficiencies and requesting a formal hearing.

On or about October 7, 1999, the Division of Taxation mailed an answer to the petition to the Division of Tax Appeals.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge analyzed the facts of this case, which are not in dispute, with the statute, regulations and applicable case law and found that the Division properly taxed petitioner herein. The Administrative Law Judge first addressed petitioner's argument that the source of income was dependent upon where the work was performed and not on where the person paying for the service was located. The Administrative Law Judge, relying on *Matter of Speno v. Gallman* (35 NY2d 256, 360 NYS2d 855), dismissed this argument stating that the current law demands that the convenience of the employer test be employed to determine whether tax liability arises in a certain case. Here, the Administrative Law Judge noted that petitioner's employer, NOITU, had its office in New York State and it operated two medical centers which were located in New York State. Petitioner worked in Nashville for personal reasons and, in fact, his employer would not have objected to his working in New York. Moreover, petitioner concededly worked several days within New York for each of the years at issue. Thus, the Administrative Law Judge held that the convenience of the employer doctrine was properly applied by the Division in this case.

Petitioner further argued that the convenience of the employer test violated his due process rights. Petitioner claimed that not only was the test illogical, but, as applied to him, was unconstitutional because it resulted in taxing his income out of all proportion to his contacts and benefits from New York State. The Administrative Law Judge rejected this argument emphasizing that the source of petitioner's income was his New York State employer and, based upon the decision in *Matter of Colleary v. Tully* (69 AD2d 922, 415 NYS2d 266), that fact establishes the necessary connection with New York to impose tax on the income at issue herein.

Moreover, petitioner argued that the convenience of the employer test as applied to him violated the Equal Protection Clause of the United States Constitution by applying an irrational standard for distinguishing between taxpayers who can allocate income between New York State and elsewhere and taxpayers who cannot allocate. Petitioner asserted that the dividing line between people who can allocate their income and people who cannot is whether they are required to work out of state by their employer. The Administrative Law Judge rejected petitioner's interpretation of the convenience of the employer test. The Administrative Law Judge noted that the test is not whether an employee is required to work out of state by his employer, but rather, whether it is necessary to perform services out of state in the service of the employer. Additionally, the Administrative Law Judge pointed out that the rational basis for the rule is that it protects the integrity of the apportionment scheme by including as taxable income receipts from services which are substantially connected to New York but which are performed outside of New York to effect a reduction in New York State taxes (*see*, *Matter of Colleary v. Tully*, *supra*).

Lastly, the Administrative Law Judge considered the issue of whether petitioner was entitled to recover reasonable administrative and litigation costs. The Administrative Law Judge denied such request by petitioner. The Administrative Law Judge reasoned that, pursuant to Tax Law §3030(a), only a prevailing party is entitled to receive such costs and petitioner has failed to prove that he was a prevailing party in this proceeding. Accordingly, the Administrative Law Judge denied petitioner's petition in its entirety.

ARGUMENTS ON EXCEPTION

On exception, petitioner argues the same issues that he presented to the Administrative Law Judge below. Petitioner states that New York can tax only that proportion of

petitioner's income as it relates to the proportion of total working days that were spent within New York State. Petitioner claims that the taxing of 100% of his income, despite the fact that he spent only 25% of his working days within New York State, is in violation of both the Due Process Clause and the Equal Protection Clause of the United States Constitution. Additionally, petitioner argues that he is entitled to an award of reasonable administrative and litigation expenses since the Division's position in this case flies in the face of not only the law, but its own audit guidelines.

The Division agrees with the determination of the Administrative Law Judge. The Division states that the convenience of the employer doctrine was properly applied to the facts of this case. The Division asserts that the wages of petitioner from a New York employer are taxable to New York since petitioner admits that he worked both within and without the state solely for his convenience. Furthermore, the Division emphasizes that the case law demonstrates that the convenience of the employer doctrine has been upheld as constitutional. Despite the assertions made by petitioner to the contrary, the Division claims that this case is clear cut due to its facts and that portraying the facts of this case as an issue of whether petitioner was within commuting distance from New York is inappropriate. Lastly, the Division states that petitioner's request for costs in this case is premature. Basically, since petitioner has not proven that he is a prevailing party, the Division argues that costs cannot be awarded to him. Therefore, the Division respectfully requests that the determination of the Administrative Law Judge be sustained.

OPINION

We affirm the determination of the Administrative Law Judge.

This case involves the doctrine of the convenience of the employer and whether such test was properly applied to the facts of this case. Tax Law §631 defines the New York source income of a nonresident individual, in pertinent part, as "[t]he net amount of items of income, gain, loss and deduction entering into his federal adjusted gross income ... derived from or connected with New York sources" (Tax Law §631[a][1]). Furthermore, the statute further clarifies the phrase *Income and deductions from New York sources* to include those items attributable to "a business, trade, profession or occupation carried on in this state" (Tax Law §631[b][1][B]). The Commissioner's regulations at 20 NYCRR 132.18(a) address the convenience of the employer doctrine and provide, in pertinent part, that:

> [i]f a nonresident employee ... performs services for his employer both within and without New York State, his income derived from New York State sources includes that proportion of his total compensation for services rendered as an employee which the total number of working days employed within New York State bears to the total number of working days employed both within and without New York State. The items of gain, loss and deduction ... of the employee attributable to his employment, derived from or connected with New York State sources, are similarly determined. However, any allowance claimed for days worked outside New York State must be based upon the performance of services which of necessity, as distinguished from convenience, obligate the employee to out-of-state duties in the service of his employer.

Petitioner asks us to focus on the fact that the taxpayer's place of business is not in New York which he claims distinguishes his case from the clear precedent in this area of law. Petitioner misinterprets the statute. The analysis of this

case focuses on the fact that petitioner, a nonresident of New York State, is employed by a New York State employer and performs his job duties both within and without the State. As the stipulated facts to this case indicate, petitioner resides in Nashville solely for his convenience and personal reasons. The fact that petitioner considered himself to be working principally in Tennessee is not dispositive in this case. The correct focus is that petitioner derives his income from the performance of duties for his New York State employer (*see, Matter of Colleary v. Tully, supra* [wherein it was held that the income of an out-of-state self-employed person is taxable only through his intrastate activities since these activities are the connection with the State, whereas, the source of an out-of-state employee's income is the employer within the State]).

As noted by the Administrative Law Judge below, the case law has confirmed that the convenience of the employer doctrine is the proper test to determine the tax liability of a nonresident individual who is employed by a New York employer yet, for one's own convenience, chooses to perform his job duties both within and without New York. The Court of Appeals has held that:

> a nonresident who performs services in New York or has an office in New York is allowed to avoid New York State tax liability for services performed outside the State only if they are performed of necessity in the service of the employer. Where the out-of-State services are performed for the employee's convenience they generate New York State tax liability (*Matter of Speno v. Gallman, supra*, 360 NYS2d, at 857-858).

Therefore, we disagree with petitioner that the facts of his case are unusual. We view this case as a textbook situation where a nonresident works for a New York employer both

within and without the State for his own convenience and, as such, was properly taxed on his income by the Division in this case.

Petitioner has tried to differentiate his case from the situation involving an individual who is within commuting distance to New York State and chooses to work at home rather than to travel into New York in an effort to avoid the resultant tax liability. Petitioner argues that since he is not a commuter, he should not be subject to the convenience of the employer doctrine. We reject this proposition.

Obviously, the statute does not address the issue as involving commuters. However, petitioner's assertion that since he resides 900 miles from New York and, thus, is not a person who is trying to avoid taxation by merely claiming to work at home rather than drive to work is not the focus of the statute or the case law. Clearly, the issue of how far away an individual lives from his New York State employer cannot control the outcome of this case. We are not at liberty to judge what is a commutable distance for employment for any particular individual and we will not interpret this rule as involving commuting. As stated above, the taxability at issue is resolved by a proper focus on whether petitioner was working in Nashville out of necessity to his employer or rather, as the facts herein establish, merely out of the convenience of the employee. For these reasons, we are not persuaded by petitioner's arguments and find that the Division properly taxed petitioner herein.

Petitioner continues to argue that the application of the convenience of the employer doctrine violates his due process rights by taxing his income out of all proportion to his contacts with and benefits from New York State. Petitioner states that:

> the Division conveniently ignores a basic Constitutional fact: that a state, while it can tax all of the income of a resident by reason of his residency, can tax the income of a nonresident only to the extent that the income is derived from business conducted within the state (Petitioner's brief in reply, p. 5).

Again, petitioner's argument is based upon a flawed interpretation of the statute. As we have reasoned above, it is the New York State employer from which petitioner derives his income that is the focus of the analysis. The fact that petitioner actually works in New York for a minority of his total working days is irrelevant when he is performing his duties both within and without the State for his New York State employer. As we have held, the convenience of the employer doctrine was properly applied to the facts in this case and as such we do not find that there has been a violation of the Due Process Clause as applied to petitioner herein.

Similarly, we reject petitioner's claim that application of the convenience of the employer doctrine violates the Equal Protection Clause. Petitioner maintains that such doctrine has the result of allowing some nonresidents to allocate their income between New York State and their state of residence while not allowing other nonresidents to do so based upon whether they are required to work outside New York State by necessity of their employer or for the employee's convenience. Petitioner claims that there is no rational basis for this distinction. However, the convenience of the employer doctrine serves to protect the integrity of the apportionment scheme and such doctrine has been upheld as valid (*see*, *Matter of Colleary v. Tully*, *supra*; *see also*, *Matter of Speno v. Gallman*, *supra*). Accordingly, we reject petitioner's contention that there was a violation of the Equal Protection Clause.

The last issue raised by petitioner herein is a request for costs. Tax Law §3030(a) provides for a discretionary award of attorneys' fees to a prevailing party in a proceeding in which the Commissioner is a party and which involves the determination, collection or refund of any tax. Petitioner's request for costs is denied since he has not proven that he is a prevailing party. Therefore, he is not entitled to recover any costs arising from this litigation.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Thomas L. Huckaby is denied;

2. The determination of the Administrative Law Judge is sustained;

3. The petition of Thomas L. Huckaby is denied; and

4. The notices of deficiency dated April 6 and 27, 1998 are sustained.

Thomas L. Huckaby

New York Division of Tax Appeals, Administrative Law Judge Unit,

DTA No. 817284, February 8, 2001.

In the Matter of the Petition of **THOMAS L. HUCKABY** for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law and the Administrative Code of the City of New York for the Years 1994 and 1995.

Petitioner, Thomas L. Huckaby, 124 Taggart Avenue, Nashville, Tennessee 37205-4427, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law and the Administrative Code of the City of New York for the years 1994 and 1995.

On March 27, 2000 and March 31, 2000, respectively, petitioner by his representative, Peter L. Faber, Esq., and the Division of Taxation by Barbra G. Billet, Esq. (Jennifer L. Hink, Esq., of counsel), waived a hearing and agreed to submit the matter for determination based on documents and briefs to be submitted by August 17, 2000, which commenced the six-month period for the issuance of this determination. After review of the evidence and arguments presented, Arthur S. Bray, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether Tax Law §631(b) permits the Division of Taxation to tax a nonresident on compensation for services that are performed out of state.

II. Whether application of the convenience of the employer test results in the taxation of income out of all proportion to petitioner's contacts with, and benefits from, New York State in violation of the United States Constitution.

III. Whether the Division of Tax Appeals should award petitioner reasonable administrative and litigation costs, including attorney's fees.

FINDINGS OF FACT

1. Petitioner, Thomas L. Huckaby was domiciled in Nashville, Tennessee. He did not maintain a permanent place of abode in New York State nor did he spend more than 183 days in New York State in either of the years in issue. He was not a resident of New York State within the meaning of section 605(b) of the Tax Law.

2. Petitioner was an employee of Multi-User Computer Solutions ("MCS") of Nashville, Tennessee, from 1983 until July 1991. He lived and worked in Nashville during this period and was domiciled in Tennessee.

3. MCS was engaged in the business of developing and selling computer software.

4. Petitioner's duties for MCS consisted of developing and servicing computer programs and advising MCS's customers with respect to their use.

5. Petitioner has a Bachelor of Science degree with a major in accounting. Before his MCS employment, petitioner developed and implemented a Basic Language payroll program and a Medicare/insurance billing program while working as controller for a Tennessee home healthcare agency. While working for MCS he developed an expertise in computer programming and transitioned from a single-user to a multiuser computer environment. Subsequent to petitioner's MCS employment, he received training in and developed computer applications using SQL, Oracle Forms 3.0, and Reportwriter 1.0.

6. The National Organization of Industrial Trade Unions ("NOITU") is an umbrella organization of which industrial trade unions are members. It provides various administrative services for its member unions. Among its services are to administer health claims payment, medical centers, and pension programs for members of its member unions.

7. NOITU invoices the employers of members of its member unions for welfare, dues, and pension fund contributions. Monies collected from the employers are used for the benefit of NOITU's member unions through the various fringe benefit programs that NOITU administers.

8. NOITU was a client of MCS before July 1991. MCS developed computer software that NOITU used in administering its fringe benefit programs.

9. Petitioner, as part of his duties for MCS, worked on matters for NOITU and dealt directly with NOITU's personnel.

10. In 1991, MCS underwent a business reorganization that resulted in the termination of petitioner's employment with MCS.

11. NOITU needed a programmer with petitioner's skills and, accordingly, it hired petitioner as an employee in 1991.

12. Petitioner and NOITU agreed that petitioner, who had served NOITU from Nashville in the past, would continue to be based in Nashville. His duties consisted of continuing to support the Basic Language programs that MCS had written for NOITU on a BTI computer; assisting the New York computer department manager in selecting a replacement computer, operating system, and application programming language; writing interface programs that facilitated the transfer of data from the old BTI computer to a new IBM computer; rewriting the health claims payment program in the Oracle SQL computer language; writing new pension tracking and annual reporting programs; and supporting all other computer programming areas, including membership maintenance, employer billing, and medical center applications.

13. NOITU's office was in Jamaica, New York. It also operated two medical centers, one in Manhattan and one on Long Island.

14. Petitioner and NOITU agreed that petitioner would come to NOITU's New York office only when needed to gather guidelines for revision of existing or creation of new computer programs, and to instruct NOITU's New York personnel in their use. In May of 1995, petitioner spent 19 working days in New York to assist with the one-time conversion from the BTI to the IBM computer.

15. Working as an employee of NOITU was petitioner's only business activity during the years at issue. He did not work for any other person or organization, either as an employee or as an independent contractor.

16. Petitioner set up an office in his home in Nashville to perform duties for NOITU. NOITU arranged with MCI Telephone Company to install a long-distance data line from its Jamaica, New York office to petitioner's Nashville office. Petitioner had a dedicated voice telephone that he used solely for business purposes. He had another telephone line for personal calls. Petitioner's Nashville office consisted of one room in his home. In addition to the MCI communication equipment, the office included two computer terminals, which were later replaced with a personal computer and a printer. Petitioner had his own desk but NOITU paid for a desk chair, a dry-mount wall board, and two 30" x 72" work tables. Office expenses, including a telephone and supplies, were reimbursed to petitioner by NOITU on a monthly basis.

17. Most of petitioner's computer programming work was done in Nashville. He traveled to New York for the purpose of instructing NOITU's New York personnel in the use of new or revised computer programs.

18. NOITU did not require petitioner to perform his work in Nashville. It would not have objected if he had performed it in New York. Petitioner's decision to do his programming work in Nashville rather than New York was made for personal reasons.

19. Petitioner's work for NOITU did not involve any administrative responsibilities for the New York office nor did he supervise New York personnel or have any involvement in the running and the management of the New York office. His work involved preparing and revising computer programs that were used by NOITU and instructing NOITU's personnel in their use. In the course of his work he was in daily contact with NOITU's New York office by telephone.

20. Petitioner was not an officer or member of the board of directors of NOITU. He owned no stock or any other equity interest in NOITU, nor did he lend any money to NOITU.

21. Nashville is 900 miles from New York City. Published airline schedules indicate that a flight from Nashville to New York takes about two hours.

22. In a typical week, petitioner spent approximately 45 hours working for NOITU. Most of his work was done at his office in Nashville.

23. During 1994, petitioner worked 187 days in Tennessee and 59 days in New York.

24. During 1995, petitioner worked 180 days in Tennessee and 62 days in New York.

25. When petitioner came to New York on NOITU business, he stayed in a hotel near NOITU's office.

26. In 1994, petitioner came to New York eight times. His average stay was eight work days and his longest stay was ten work days.

27. In 1995, petitioner came to New York eight times. His average stay was 8 work days and his longest stay was 19 work days.

28. Petitioner filed timely Federal income tax returns for 1994 and 1995.

29. Petitioner filed timely New York State personal income tax returns for 1994 and 1995. On each return, petitioner allocated his wage and salary income to New York on the basis of the total number of days worked in New York over the total number of days worked in the year.

30. On or about November 28, 1997, the Audit Division of the Division of Taxation ("Division") mailed to petitioner statements of proposed audit changes for 1994 and 1995 which explained that there were deficiencies of New York State and New York City personal income tax. For each of the years in issue, the Division explained, in part, that days worked at home do not form a proper basis for allocation of income by a nonresident. According to the Division, "any allowance claimed for days worked outside of New York must be based on the performance of services which, because of the necessity of the employer, obligate the employee to out-of-state duties in the service of his employer." Upon applying this principle, the Division allocated the total amount reported by petitioner as wages, salaries and tips from his New York employment to New York State and New York City.

31. On or about April 6, 1998 and April 27, 1998, the Division mailed to petitioner notices of deficiency which asserted deficiencies of New York State and New York City personal income taxes as follows:

Date of Notice	Jurisdiction	Year	Amount of Tax	Interest	Balance Due
April 6 1998	N.Y.S.	1994	$2,204.91	$590.88	$2795.79
	N.Y.C.	1994	$202.53	$54.28	$256.81
April 27, 1998	N.Y.S.	1995	$2,182.66	$378.18	$2,560.84
	N.Y.C.	1995	$202.94	$35.16	$238.10

32. A conciliation conference was held on this matter before the Department of Taxation and Finance's Bureau of Conciliation and Mediation Services on March 16, 1999. On

or about June 4, 1999, the Bureau of Conciliation Services mailed to petitioner a Conciliation Order sustaining the deficiencies proposed in the notices of deficiency.

33. On or about August 26, 1999, petitioner mailed to the Division of Tax Appeals a petition disagreeing with the proposed deficiencies and requesting a formal hearing. 34. On or about October 7, 1999, the Division of Taxation mailed an answer to the petition to the Division of Tax Appeals.

35. In accordance with State Administrative Procedure Act §307(1), petitioner's proposed findings of fact have been generally accepted and incorporated herein. Additional findings of fact have also been made. Proposed finding of fact "35" was rejected because it was not supported by the record.

SUMMARY OF THE PARTIES' POSITIONS

36. Petitioner argues that the Tax Law does not permit the Division to tax a nonresident on compensation for services which are rendered out of state. He notes that threequarters of his working days were spent out of state. According to petitioner, the Tax Law prohibits the taxation of income attributable to out-of-state services. Petitioner further submits that the convenience of the employer test was developed to prevent abuses by commuters and should not be applied to an individual who lives well beyond commuting range and whose principal place of business is outside of New York.

Petitioner maintains that applying the convenience of the employer test to him would result in taxing income out of all proportion to his contacts with, and benefits from, New York State in violation of the United States Constitution. As corollaries to the foregoing proposition, petitioner argues

that applying the convenience of the employer test would result in taxing income that was not derived from New York State in violation of the Due Process Clause of the United States Constitution, that the convenience of the employer test violates the Equal Protection Clause of the United States Constitution by applying an irrational standard for distinguishing between taxpayers who can allocate income and those who cannot, and that the Division of Tax Appeals has the authority to declare the application of a valid statute to a particular taxpayer's factual situation to be unconstitutional. Lastly, petitioner maintains that he should be awarded administrative and litigation costs including attorney fees.

37. In response to the foregoing, the Division contends that Tax Law §631 requires the Division to tax nonresident employees on income earned from a New York employer when the work is performed outside of New York for the convenience of the employee rather than the necessity of the employer. It is also argued that the test in question has survived repeated constitutional challenges as to whether it has a rational basis and whether it requires sufficient contacts with New York. The Division maintains that the test is an appropriate apportionment scheme to ensure that resident and a nonresident employees are treated equally. According to the Division, the convenience of the employer test was developed to prevent abuse by those who work within and without New York. It is further submitted that the use of the word "attributable" in the statute demonstrates that the statute was intended to allow the Division to tax compensation earned by a nonresident employee. The Division posits that its interpretation is supported by judicial interpretation of the statute and the doctrine of *stare decisis*. Further, it is submitted that statutory construction justifies the current interpretation of the statute and its regulation.

Lastly, the Division argues that the request for administrative and litigation costs is premature and, if it is not premature, the request should be denied because there is substantial justification for the position of the Division. In regard to an argument raised by petitioner with respect to the awarding of costs and fees, the Division acknowledges that there may be some confusion regarding the topic of allocation in the income tax audit manual.

CONCLUSIONS OF LAW

A. Petitioner first argues that Tax Law §631(b) does not permit the Division to tax a nonresident on income that is compensation for services that are in fact performed out of state. Relying upon an opinion of the Attorney General which was issued in 1919 (1919 Report of Atty Gen 301), petitioner submits that the source of income is dependent upon where the work is performed and not on where the person paying for the service is located. Petitioner maintains that three-quarters of his working days were spent out of New York State and that the statutory language prohibits the taxation of income attributable to these out-of-state services.

Petitioner's argument is contrary to well-established judicial interpretation of Tax Law §631. Subdivision (a) of section 631 provides, in part, that "[t]he New York source income of a nonresident individual shall be the sum of the following: (1) the net amount of items of income, gain, loss and deduction entering into his federal adjusted gross income, as defined in the laws of the United States for the taxable year, derived from or connected with New York sources... ." To the extent pertinent, the Tax Law defines the phrase "[i]tems of income, gain, loss and deduction derived from or connected with New York sources" as those which are attributable to "a business, trade, or profession or occupation carried on in this state... ." (Tax Law §631[b].) The

Commissioner's regulations at 20 NYCRR 132.18(a) provide, in part, that:

> If a nonresident employee ... performs services for his employer both within and without New York State, his income derived from New York State sources includes that proportion of his total compensation for services rendered as an employee which the total number of working days employed within New York State bears to the total number working days employed both within and without New York State.... . However, any allowance claimed for days worked outside of New York State must be based upon the performance of services which of necessity, as distinguished from convenience, obligate the employee to out-of-state duties in the service of his employer.

The decision of the Court of Appeals in *Matter of Speno v. Gallman* (35 NY2d 256, 360 NYS2d 855) is instructive on the points raised by petitioner. In *Speno*, the taxpayers were residents of New Jersey who filed joint New York State nonresident income tax returns for the years in issue. Mr. Speno was the president of Frank Speno Railroad Ballast Cleaning Co. which had its principal office in Ithaca, New York and additional offices in Syracuse, New York and Geneva, Switzerland. On their income tax returns for each of the years in issue, the taxpayers allocated a portion of their income to days worked at the taxpayers' home in New Jersey. The work consisted essentially of making phone calls. The Division recomputed the taxpayers' taxes by deeming the days worked in New Jersey in 1960 as nonworking days and included them as days worked in New York on the 1961 return.

After a hearing, the State Tax Commission applied the "convenience of the employer" test and recalculated the

Spenos' tax liability to include the days worked in New Jersey. On the appeal which followed, the Speno's challenged the validity and application of the "convenience of the employer" test.

Initially, the Court noted that the meaning of the phrase "sources within the state" is the focal point and that the first interpretation was made in 1919 by the Attorney General who stated that the source of income relates to "'the work done, rather than the person paying for it' (1919 Report of Atty Gen 301). "(*Id.*, 360 NYS2d at 857.) This test resulted in the performance doctrine which was that compensation for services performed outside of the State would not be taxable. The Court then noted that because of the large number of nonresidents who avail themselves of employment within New York, the place of performance test was refined by the "convenience of the employer test." Under this doctrine, a nonresident who performs services in New York or has an office in New York is not subject to New York State tax liability on the services performed outside of New York State if they are performed of necessity in the service of the employer. The Court noted that the refinement of this legal doctrine had been consistently applied by the courts of the State of New York. The Court then pointed out that the cases relied on by the Spenos were inapplicable because the taxpayer either did not come into New York or was not required to come into New York. The Court concluded that since Mr. Speno performed services within New York for his employer, the "convenience of the employer test" was properly applied. (*Id.*, 360 NYS2d at 859.)

On the basis of *Speno*, it is clear that petitioner's initial arguments are spurious. The place of performance doctrine is no longer the law of the State of New York. The salient facts are that NOITU's office was in Jamaica, New York and it operated two medical centers, one in Manhattan and one on

Long Island. Petitioner, an employee of NOITU, worked outside of New York solely for his own personal reasons. His employer would not have objected if he had decided to perform his duties in New York. Further, petitioner worked a significant number of days in New York during each of the years in issue. NOITU did not require petitioner to perform his work in Nashville. It follows from the foregoing that the decision to do programming work in Nashville was not made because of necessity in the service of the employer. Thus, under the convenience of the employer test, the Division properly considered the days worked in petitioner's home in Tennessee as days worked in New York.

B. Petitioner argues that the convenience of the employer test was developed to prevent abuses by commuters. According to petitioner, it should not be applied to an individual who lives well beyond commuting range and whose principal place of business is outside of the State of New York.

This argument is also unconvincing. Petitioner is correct that the test protects the integrity of the apportionment scheme by including as taxable income receipts from services which are substantially connected to New York but which are performed outside of New York (*Matter of Colleary v. Tully*, 69 AD2d 922, 415 NYS2d 266, 268). However, the test also serves another purpose. Since New York residents do not gain a tax benefit from working at home, neither should nonresidents who perform services or maintain an office in New York State (*see*, *Matter of Speno v. Gallman*, *supra*, at 259, 360 NYS2d at 858). The latter factor is particularly important in this instance because there has been no showing that the services provided by petitioner could not have been performed at one of the employer's New York offices.

In effect, petitioner has proposed a commuting distance from the employer test to determine whether the income from the New York employer is subject to tax. However, the commuting distance between a taxpayer's home and the location of the New York employer is of no consequence under either the Tax Law or the regulations. Further, as practical matter, such a test would be impossible to apply. For example, under the proposed test, the dividing line would presumably depend on the availability of public transportation and the time it would take to commute from the particular individuals home. Would one employ a subjective or objective test to determine what constitutes an acceptable commuting time or distance to work? In sum, there is no way of determining how many miles to use as the dividing line for determining when income would be subject to New York tax.

C. Petitioner argues that the convenience of the employer test does not comport with common sense. It is submitted that if petitioner had not spent any time working in New York, it would not have the power to tax any of his income. However, if petitioner worked just one day in New York and 300 days in Nashville, all of his income would be subject to New York State personal income tax.

The same point set forth above from *Colleary* also addresses the contention raised by petitioner. The result is mandated by the need to protect the integrity of the apportionment scheme. Presumably, an employee who does not come to New York at all is not working out of state in order to reduce his New York State taxes. However, the same may not be concluded of the employee who is in New York for a limited period of time.

D. Petitioner contends that application of the convenience of the employer test is unconstitutional because it would result

in taxing income out of all proportion to his contacts and benefits from New York State. This argument is also without merit. The source of an out-of-State employee's income is the New York State employer. The employment relationship establishes the necessary connection with New York to impose tax on the income which is in issue (*Matter of Colleary v. Tully, supra*, at 922, 415 NYS2d at 268).

E. Petitioner further argues that the convenience of the employer test violates the Equal Protection Clause of the United States Constitution by applying an irrational standard for distinguishing between taxpayers who can allocate income between New York State and elsewhere and taxpayers who cannot. Petitioner submits that the dividing line between people who can allocate their income and people who cannot is whether they are required to work out of state by their employer. It is submitted that there is no rational basis for this distinction.

First, contrary to petitioner's argument, the test is *not* whether an employee is *required* to work out of state by his employer. Rather, the test asks whether it is *necessary* to perform services out of state in the service of the employer (*see, Matter of Speno v. Gallman, supra*, at 256, 360 NYS2d at 857.) Second, as previously noted, the rational basis for the rule is that the test protects the integrity of the apportionment scheme by including as taxable income receipts from services which are substantially connected to New York but which are performed outside of New York to effect a reduction in New York State taxes (*Matter of Colleary v. Tully, supra*, at 922, 415 NYS2d at 268).

F. Petitioner asks the Division of Tax Appeals to award petitioner reasonable administrative and litigation costs including, without limitation, attorneys' fees. This request is denied since, among other things, costs and fees are awarded

only to a prevailing party (Tax Law §3030[a]). In view of the foregoing, petitioner's argument regarding the audit guidelines is moot and will not be addressed.

G. The petition of Thomas L. Huckaby is denied, and the notices of deficiency issued April 6 and 27, 1998 are sustained.

/s/Arthur S. Bray

ADMINISTRATIVE LAW JUDGE

Supreme Court, U.S.
FILED
SEP 16 2005
OFFICE OF THE CLERK

No. 04-1734

IN THE

Supreme Court of the United States

THOMAS L. HUCKABY,

Petitioner,

v.

THE NEW YORK STATE DIVISION OF TAX APPEALS, TAX APPEALS TRIBUNAL and THE COMMISSIONER OF TAXATION AND FINANCE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether New York State's taxation of petitioner's entire salary from his New York employer satisfied the requirements of the Due Process Clause and the Equal Protection Clause where petitioner, solely for his own convenience, performed a significant amount of his work at his Tennessee home.

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NEW YORK RULES AND REGULATIONS

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STATEMENT OF THE CASE

Petitioner Thomas J. Huckaby, a resident of Tennessee who works for a New York employer, performed a significant amount of his work from his home in Nashville. He does not dispute that this arrangement was solely for his own convenience, rather than at his employer's behest. On his 1994 and 1995 New York personal income tax returns, he excluded from his reported New York income the portion of his salary attributable to the days he worked at home.

In determining tax liability of nonresident employees for days worked outside of New York State, New York applies a "convenience of the employer" test (hereinafter "the convenience test"), N.Y. Comp. Codes R. & Regs. tit. 20, § 132.18 (2001). This test provides that any allowance (*i.e.*, exclusion from New York income) claimed by a nonresident employee for days worked outside New York "must be based upon the performance of services which of necessity, as distinguished from convenience, obligate the employee to out-of-state duties in the service of his employer." N.Y. Comp. Codes R. & Regs., tit. 20, § 132.18(a) (2001).

In auditing petitioner's 1994 and 1995 tax returns, respondent Commissioner of Taxation and Finance applied the convenience test. The Commissioner determined that petitioner worked at home for his own convenience rather than because of the necessities of his employer's business, and thus that the days that he worked at home must be counted as days worked in New York. The Commissioner accordingly assessed New York nonresident income tax on the income that petitioner earned on those days.

Petitioner then sought a redetermination of his tax liability, claiming, *inter alia*, that the Due Process and Equal

Protection Clauses barred application of the convenience test to him. The Administrative Law Judge, the Tax Appeals Tribunal, the Appellate Division of New York State Supreme Court, and the New York Court of Appeals all rejected his challenge. *See* Pet. App. at 62-63 (Administrative Law Judge); 46-47 (Tax Appeals Tribunal); 32-33 (Appellate Division); 8-15 (Court of Appeals). Though petitioner now presents a Commerce Clause challenge to the Commissioner's determination of his tax liability, *see* Pet. at i, he did not raise this claim at any point in the proceedings below, *see* Pet. App. at 9 n.4 (Court of Appeals); 32-33 (Appellate Division); 42-43, 46-48 (Tax Appeals Tribunal); 56-58, 62-63 (Administrative Law Judge).

REASONS FOR DENYING THE PETITION

Petitioner's claim that the application of the convenience test to him violates the Commerce Clause was neither raised nor decided at any point in the proceedings below, and accordingly is not properly before this Court. Petitioner's remaining due process and equal protection claims are not cert-worthy. In rejecting these challenges, the New York Court of Appeals correctly applied settled principles of constitutional law to uphold a concededly valid New York tax regulation. Petitioner merely seeks error correction on these points; he does not claim – nor could he – that the state courts or lower federal courts are divided on the underlying constitutional questions at issue in this case.

I. Petitioner's Commerce Clause Argument Is Not Properly Before This Court

The claim set forth in Petitioner's second question presented, that the application of the convenience test to him violated the Commerce Clause, is not properly before this Court. The New York Court of Appeals, noting that

"petitioner does not claim that application of the convenience rule in his case violates the Commerce Clause," did not decide this question. Pet. App. at 9 n.4.

While the court below did consider the "Commerce Clause implications" of several due process cases involving taxes on interstate business, Pet. App. at 8-10, it concluded that this Court "has established distinct Commerce Clause and due process restraints in its state taxation rules." Pet. App. at 11. In any event, reference to Commerce Clause precedent cannot substitute for raising a claim in a proceeding below prior to asking for this Court's review. Because petitioner's Commerce Clause claim was neither raised nor decided below, this Court should not consider it now. *See, e.g., Yee v. City of Escondido*, 503 U.S. 519, 532-33 (1992).

II. Petitioner's Remaining Claims Are Not Cert-Worthy

Petitioner's remaining claims, which challenge New York's application of the convenience test under the Due Process and Equal Protection Clauses, are not cert-worthy for several reasons.

First, petitioner has not alleged a conflict among the states' highest courts or the federal circuit courts on either of these questions. Rather, he contends that the New York Court of Appeals did not correctly apply settled constitutional precedent to the facts of this case. As petitioner himself concedes, "the constitutional principles that Petitioner's case brings to bear are not [new] and they must be applied to prevent New York's unconstitutional taxation of nonresident telecommuters." Pet. at 21. For this reason alone, a grant of certiorari is not warranted. *See* S. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.")

Second, this case does not present an issue of nationwide importance. While petitioner stresses the significant number of commuters nationwide, *see* Pet. at 3-4, 21, New York's convenience rule obviously affects only those individuals who commute to New York State. And even petitioner himself effectively concedes the limited impact of the decision below in acknowledging that the convenience rule may be validly applied in other circumstances. *See* Pet. at 18 n.3 (application to weekend days spent working); 20-21 (referencing *Zelinsky v. Tax Appeals Tribunal*, 801 N.E.2d 840 (N.Y. 2003), *cert. denied*, 541 U.S. 1009 (2004)) (application to commuter living in Connecticut and working in Manhattan)).

III. The Decision Below Is Consistent With The Precedent Of This Court

Not only does petitioner seek error correction alone in this case, but there is no error below to correct. The New York Court of Appeals was correct in deciding that taxing all of petitioner's salary pursuant to the convenience test comported with the Due Process and Equal Protection Clauses.

A. Application of the convenience test to petitioner does not violate the Due Process Clause.

New York's taxation of nonresidents adheres to principles established by this Court over 80 years ago. A state has unquestioned power to tax nonresidents on their income derived from sources within the state. *See Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450, 463 n.11 (1995); *International Harvester Co. v. Wisconsin Dep't of Taxation*, 322 U.S. 435, 441-42 (1944); *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60, 75 (1920); *Shaffer v. Carter*, 252 U.S. 37, 50 (1920). Accordingly, Tax Law § 601(e)(1)

taxes the income of nonresident individuals "derived from sources in this state." N.Y. Tax Law § 601(e)(1) (McKinney Supp. 2005). Tax Law § 631(a)(1) describes "New York source income of a nonresident individual" as including "the net amount of items of income, gain, loss and deduction entering into his federal adjusted gross income . . . , derived from or connected with New York sources." N.Y. Tax Law § 631(a)(1) (McKinney Supp. 2005). "Income . . . from New York sources," in turn, is defined as income attributable to "a business, trade, profession or occupation carried on in this state." N.Y. Tax Law § 631(b)(1)(B) (McKinney Supp. 2005).

When a nonresident such as petitioner renders personal services as an employee both inside and outside New York State, his income is generally apportioned to New York by the ratio of days worked in New York to the total days worked both in and out of New York. *See* N.Y. Tax Law 631(c) (McKinney Supp. 2005); N.Y. Comp. Code R. & Regs., tit. 20, § 132.18(a) (2001). However, apportionment based on physical presence is limited by the convenience test, such that days that the employee works outside New York when not required to do so by the employer are treated as days worked in New York. *See* N.Y. Comp. Code R. & Regs., tit. 20, § 132.18 (2001). Here, the New York Commissioner of Taxation and Finance taxed petitioner on his entire salary from his New York employer because he performed a significant portion of this work from his Nashville, Tennessee home for his own convenience.

As the New York Court of Appeals noted, under this Court's precedent, "all that is required to satisfy due process is some minimal connection between the taxpayer and the state, and that the income the state seeks to tax be rationally related to values connected with the state." Pet. App. at 11 (citing *Moorman Mfg. Co. v. Bair*, 437 U.S. 267 (1978)

(internal quotations omitted)). Application of the convenience test to petitioner meets this standard. While petitioner argues that New York is taxing him out of all proportion to the activities he carried on here, a "place of performance" test is not constitutionally required.

This Court has held that due process is satisfied where "the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state." *Wisconsin v. J.C. Penney* Co., 311 U.S. 435, 444 (1940). As the Court of Appeals concluded in a prior challenge, the convenience test satisfies due process because of the "host of tangible and intangible protections, benefits and values" New York provided to the taxpayer and his employer every day, regardless of whether the taxpayer chose to absent himself from New York. *Zelinsky v. Tax Appeals Tribunal*, 801 N.E.2d 840, 848 (N.Y. 2003), *cert. denied*, 541 U.S. 1009 (2004). Where New York State has provided petitioner with the opportunity to earn a salary every day of the year at a job that, but for petitioner's personal choice to work at his Tennessee home, would be performed in New York, due process is satisfied. *See* Pet. App. at 13.

The Court of Appeals also correctly distinguished cases of this Court requiring the apportionment of taxes on businesses engaged in interstate commerce. Those cases, the court explained, raise the separate question of how income from interstate business activities is apportioned. The convenience test recognizes that where an individual is required to work outside New York by the employer's business requirements,

> the employer creates a nexus with the foreign state and essentially establishes itself as a business entity in the foreign state. . . . New York will not tax a nonresident's income derived from a New York employer's participation in interstate

> commerce because in such a case, the nonresident's income would not be derived from a New York source.

Pet. App. at 11-12 (citation omitted). However, where the employee is working outside New York because of his own personal choice rather than the business requirements of his New York employer, there is no interstate business requiring apportionment of the employee's salary, and the employee's entire salary is properly attributable to business carried on in this state.[1]

B. Application of the convenience test to petitioner does not violate the Equal Protection Clause.

For the same reasons that the Due Process Clause was not violated by the application of the convenience test to petitioner, the Equal Protection Clause was not violated either. The Court of Appeals correctly concluded that the distinction drawn by the convenience test between services performed out-of-state because of the employer's necessity and those performed out-of-state for the employee's convenience was rational: it taxes only New York source income and avoids taxing income from the employer's conduct of an interstate business. Pet. App. at 14-15.

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1. Petitioner argues that respondents admitted that "under the Due Process Clause they cannot tax a person who never sets foot in New York." Pet. at 10. On the contrary, respondent explained to the Court of Appeals that income of a nonresident employee would still be considered New York source income where the employee's absence from New York results from personal convenience rather than business necessity. Although the convenience test, by its terms, applies only when an employee performs work both within and without the State, physical presence in the state is not required by the Due Process Clause. *See Quill Corporation v. North Dakota*, 504 U.S. 298, 307-08 (1992) (regarding sales and use tax nexus). In any event, this point is irrelevant to petitioner, who admittedly spent a substantial period of time in New York during each of the years in issue.